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FEDERAL COURTS—IN RE UNITED STATES—SHOULD FEDERAL MAGISTRATES BE DELEGATED THE AUTHORITY TO APPROVE ELECTRONIC SURVEILLANCE APPLICATIONS?

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NOTES

FEDERAL COURTS—*IN RE UNITED STATES*—SHOULD FEDERAL MAGISTRATES BE DELEGATED THE AUTHORITY TO APPROVE ELECTRONIC SURVEILLANCE APPLICATIONS?

INTRODUCTION

In *Katz v. United States*,[1] the United States Supreme Court held that the protection of the Fourth Amendment applied to the subjects of electronic surveillance and, as such, law enforcement officials could not use a wiretap without first obtaining a warrant.[2] Shortly after *Katz* was decided, the 90th Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act[3] (the "Crime Bill") as a means of controlling the use of electronic surveillance. Title III was enacted to protect individual privacy rights while allowing law enforcement officials access to a highly effective surveillance technique. A few months later, the same Congress enacted the Federal Magistrates Act[4] (the "Magistrates Act") to improve the efficiency of the federal judicial system by creating a tier of qualified officials to assist district court judges.

In 1993, Judge Korman, presiding in the Eastern District of New York, delegated the task of approving a wiretap application to a United States Magistrate Judge,[5] raising the issue of whether the Magistrates Act authorized the delegation of Title III authority. In *In re United States*,[6] the United States Court of Appeals for the Second Circuit held that because the language of Title III did not specifically authorize delegation of wiretap authority to magistrates, the privacy concerns underlying the enactment of Title III pre-

1. 389 U.S. 347 (1967).
2. *Id.* at 357.
3. Pub. L. No. 90-351, 82 Stat. 212 (codified as amended at 18 U.S.C. §§ 2510-2521 (1988 & Supp. V 1993)).
4. Pub. L. No. 90-578, 82 Stat. 1107 (codified as amended at 28 U.S.C. §§ 631-639 (1988 & Supp. V 1993)).
5. *In re* United States Attorney, 784 F. Supp. 1019 (E.D.N.Y. 1992), *rev'd*, 10 F.3d 931 (2d Cir. 1993), *cert. denied*, 115 S. Ct. 64 (1994).
6. 10 F.3d 931 (2d Cir. 1993), *cert. denied*, 115 S. Ct. 64 (1994).

vented a magistrate's powers from being broadly construed in the area of electronic surveillance applications.[7]

The legislative history of the Magistrates Act clearly demonstrates that Congress intended judges to make innovative use of magistrates in order to improve the efficiency of the judicial system.[8] It is equally clear from the legislative history of Title III that Congress designed that legislation to ensure the use of electronic surveillance would be subject to restrictions that would protect individual privacy rights.[9] This Note will examine whether the concern for individual privacy that motivated the passage of Title III precludes the delegation of wiretap approval to a magistrate. Part I of this Note will review the legislative history and judicial decisions underlying Title III as well as the legislative history and judicial interpretation of the Federal Magistrates Act. A primary focus of Part I will be the criteria developed by the Supreme Court to determine functions which can be delegated to a magistrate. Part II of this Note will examine the reasoning of the Second Circuit in *In re United States*. Part III will reexamine the issue presented to the Second Circuit in light of congressional intent in passing Title III and the Magistrates Act and in light of prior judicial interpretation of the Federal Magistrates Act. Finally, this Note will conclude that the Second Circuit's narrow construction of the Magistrates Act was inconsistent with congressional intent and prior judicial interpretation of the Act.

I. LEGISLATIVE HISTORY

A. *Legislative History of Title III of the Omnibus Crime Control and Safe Streets Act of 1968*[10]

1. Congressional Purpose in Enacting Title III

Congress passed Title III of the Crime Bill for the dual purposes of protecting the privacy of communications and creating a uniform standard for permitting law enforcement agencies to monitor communications in criminal investigations.[11] At the time Title III was passed, Congress found little uniformity among the states

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7. *Id.* at 938.

8. See *infra* part I.B for a discussion of the legislative history of the Federal Magistrates Act.

9. See *infra* part I.A for a discussion of the legislative history of Title III.

10. 18 U.S.C. §§ 2510-2521 (1988 & Supp. V 1993).

11. S. REP. NO. 1097, 90th Cong., 2d Sess. 66 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2153.

regarding the approval and use of wiretaps.[12] National legislation was needed to correct a body of state and federal law which was "totally unsatisfactory" in terms of providing for privacy rights and justice.[13]

Although Title III was designed primarily to govern the use of electronic surveillance by state and federal law enforcement agencies, Congress' concern for privacy rights necessitated that all uses of electronic surveillance be controlled. As a result, Title III imposed a blanket prohibition on all electronic surveillance.[14] Congress then created an exception to this prohibition to allow law enforcement officials to employ electronic surveillance techniques when authorized by a "court of competent jurisdiction."[15] The principal target of electronic surveillance was organized crime and Congress noted that communications were essential in conducting large scale criminal activity.[16] Even though wiretaps were viewed as a necessary adjunct to the prosecution of organized crime, guidelines were required to prevent violations of the Fourth Amendment.[17]

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12. S. REP. NO. 1097, *supra* note 11, at 69, *reprinted in* 1968 U.S.C.C.A.N. at 2156.

13. *Id.*

14. 18 U.S.C. § 2511(1) provides that it is unlawful for any person to intercept any wire, oral, or electronic communication; use any device intended to intercept such communications; disclose the contents of such communication; or use the contents of such communications. *Id.*

15. § 2516. Section 2510(9)(a) defines a court of competent jurisdiction as: "(a) a judge of the United States district court or a United States court of appeals; and (b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions or wire, oral, or electronic communications." *Id.*

16. Congress also noted the difficulty in locating witnesses willing to testify against criminal organizations due to fear or self-interest. S. REP. NO. 1097, *supra* note 11, at 70-74, *reprinted in* 1968 U.S.C.C.A.N. at 2157-61.

17. The Senate Judiciary Committee was concerned that individual privacy was at great risk due to technological advances, noting:

> The tremendous scientific and technological developments that have taken place in the last century have made possible today the widespread use and abuse of electronic surveillance techniques. As a result of these developments, privacy of communication is seriously jeopardized by these techniques of surveillance. . . . No longer is it possible, in short, for each man to retreat into his home and be left alone. Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage.

Id. at 2154. *See also* Lori K. Odierna, Note, In re Motion to Unseal Electronic Surveillance Evidence: *Third Party Access to Government-Acquired Wiretap Evidence*, 17 W. NEW ENG. L. REV. 371, 373-77 (1995).

2. Judicial Decisions Underlying Title III

The history of Supreme Court decisions defining the permissible use of wiretaps begins with *Olmstead v. United States*.[18] In *Olmstead*, the Court held that the use of a wiretap did not violate the Fourth Amendment so long as no other laws were broken by the law enforcement agents who installed and used the device.[19] Congress responded to *Olmstead* by passing the Federal Communications Act,[20] prohibiting unauthorized use of electronic surveillance. The broad authorization to use wiretaps, which the Court granted in *Olmstead*, was gradually narrowed through a series of cases,[21] culminating in *Berger v. New York*[22] and *Katz v. United States*.[23]

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18. 277 U.S. 438 (1928). For a discussion of the evolution of Supreme Court wiretap decisions beginning with *Olmstead*, see Michael Goldsmith, *The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance*, 74 J. CRIM. LAW & CRIMINOLOGY 1 (1990).

19. *Olmstead*, 277 U.S. at 466. In *Olmstead*, federal officers tapped the phones of conspirators engaged in importing and distributing bootleg liquor during Prohibition. The agents monitored communications between the conspirators for several months via taps placed on phone lines outside their office and residences. In holding that the conspirators' Fourth Amendment rights were not violated, the Court reasoned that the prohibition concerning unreasonable search and seizure applied only to material things. The Court refused to read the Fourth Amendment broadly to allow for changes in technology. "'The Fourth Amendment is to be construed in light of what was deemed an unreasonable search and seizure when it was adopted and in a manner which will conserve public interests as well as the interests and rights of individual citizens.'" *Id.* at 465 (quoting Carroll v. United States, 267 U.S. 132, 149 (1924)). So long as the federal agents did not trespass on the property of those being tapped, the Court found there was no violation of Fourth Amendment rights because the telephone user "intends to project his voice to those quite outside, and that the wires beyond his house and the messages while passing over them are not within the protection of the Fourth Amendment." *Id.* at 466.

Although the Court was unwilling to find the Fourth Amendment prohibited wiretaps, it noted that Congress was free to restrict the use of wiretaps by direct legislation. *Id.* at 465-66.

20. 47 U.S.C. § 605 (1988) provides that "[n]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence [or] contents . . . of such intercepted communication to any [other] person." *Id.*

21. *See, eg.*, Nardone v. United States, 302 U.S. 379 (1937) (evidence obtained by wiretaps in violation of 47 U.S.C. § 605 is inadmissible in federal court); Weiss v. United States, 308 U.S. 321 (1939) (wiretaps are prohibited for the interception of intrastate as well as interstate calls).

Subsequently, the Court held that the *Olmstead* standard applied to "bugging" as well as wiretapping. The installation of listening devices was held to be permissible, so long as no illegal physical trespass occurred when the listening device was installed. *Compare* Goldstein v. United States, 316 U.S. 114 (1942) (evidence obtained by a microphone placed against a common wall was admissible since there was no physical trespass) *with* Silverman v. United States, 365 U.S. 505 (1961) (evidence obtained by a microphone placed inside a heating duct was inadmissible).

22. 388 U.S. 41 (1967). *Berger* involved the New York State eavesdropping stat-

The provisions of Title III were designed to conform to the criteria developed by the United States Supreme Court in *Berger*.[24] There, the Court held that a warrant for the use of a wiretap must: (1) describe, with particularity, the person, place and/or things to be searched; (2) describe the specific crime committed or being committed; (3) describe the type of conversation sought; (4) limit the scope of intrusion to prevent the search of unauthorized areas and to end the search once the necessary evidence was obtained; and (5) provide that the executing officer make a return on the warrant showing how it was executed and the results seized.[25] The *Berger* criteria are reflected in the authorization[26] and procedure[27] sections of Title III, which delineate in detail the procedure for obtaining authorization and using electronic surveillance devices. While *Berger* established the criteria that a warrant must satisfy, it was in

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ute. Berger was convicted for conspiring to bribe the chairman of the New York State Liquor Authority based on evidence obtained through a series of eavesdropping orders. The Court found the New York statute to be overly broad, resulting in a violation of Berger's Fourth Amendment rights. This violation was due to a failure adequately to meet Fourth Amendment criteria for the issuance of a warrant. *Id.* at 55-57.

23. 389 U.S. 347 (1967). *See* Samuel Dash, Katz *Variations on a Theme by* Berger, 17 CATH. U. L. REV. 296 (1968); Robert F. Scoular, *Wiretapping and Eavesdropping: Constitutional Developments From* Olmstead *to* Katz, 12 ST. LOUIS U. L.J. 513 (1968).

24. Congress noted that Title III was specifically drafted to meet the criteria outlined in *Berger* and to be in conformity with *Katz*. S. REP. NO. 1097, *supra* note 11, at 66, *reprinted in* 1968 U.S.C.C.A.N. at 2153.

25. *Berger*, 388 U.S. at 55-57.

26. 18 U.S.C. § 2516(1) (1988 & Supp. V 1993) provides:

> The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications . . . .

Id.

Title III also lists the specific offenses which can be the target of electronic surveillance such as: crimes relating to the sabotage of nuclear facilities; offenses involving kidnapping, murder or extortion; bribery of public officials; Presidential assassination; and unlawful use of explosives. § 2516(1)(a)(b)(c).

27. Section 2518 provides: "(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such applications." *Id.*

Congress noted this provision was intended to conform to the criteria enumerated in *Berger* and to assure that a judicial authority be interposed between law enforcement officials and citizens per *Katz*. S. REP. NO. 1097, *supra* note 11, at 97, *reprinted in* 1968 U.S.C.C.A.N. at 2185.

Katz that the Court abandoned the *Olmstead* doctrine that physical intrusion was required to implicate the Fourth Amendment prohibition against unreasonable search and seizure.[28]

Federal agents in *Katz* monitored a suspect's telephone conversation by placing a recording device on the outside of a public telephone booth.[29] The government argued that, consistent with the *Olmstead* doctrine, no warrant was required because there was no physical intrusion into the booth.[30] In *Katz*, the Court abandoned the *Olmstead* doctrine and held that any electronic eavesdropping constituted a search and seizure within the meaning of the Fourth Amendment.[31] Once electronic surveillance was categorized as a search and seizure, it became necessary for law enforcement officers to obtain a judicially authorized warrant before initiating the surveillance.[32]

The need for prior judicial authorization is addressed directly by Title III's requirement that applications for electronic surveillance be submitted to "a judge of competent jurisdiction" who may approve or modify the application.[33] Although electronic surveillance fell within the scope of the Fourth Amendment, Congress was unwilling to grant comparable wiretap activity to all of the judicial officers authorized to issue search warrants. Congress specified

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28. Katz v. United States, 389 U.S. 347, 353 (1967).

29. *Id.* at 349.

30. *Id.* at 352.

31. Justice Stewart, writing for the majority, reasoned that "the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures." *Id.* at 353. Stewart noted that the *Olmstead* doctrine rested on narrow trespass grounds that the Court would no longer apply:

> We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment.

Id.

32. In *Katz*, the Court noted that the agents acted with restraint. The surveillance was limited in scope and time and was confined to those periods necessary to obtain information. *Id.* at 354.

The surveillance would have been proper had the agents taken the step of seeking a warrant from a "duly authorized magistrate" prior to initiating the surveillance. "[T]he Constitution requires 'that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . .'" *Id.* at 357 (quoting Wong Sun v. United States, 371 U.S. 471, 481-82 (1962)).

33. 18 U.S.C. § 2518 (1988) (providing the procedure for interception of wire, oral or electronic communications).

that applications could only be approved by a "judge of competent jurisdiction"[34] and defined that term, as applied to the federal judicial system, as a "judge of a United States district court or a United States court of appeals."[35] Thus, Congress effectively and intentionally barred United States commissioners, who could issue both search and arrest warrants, from authorizing electronic surveillance applications.[36]

In addition to limiting which judicial officers could approve an electronic surveillance application, Congress also limited which law enforcement officials could apply for a wiretap warrant.[37] This limitation was intended to create a clear line of responsibility within the Department of Justice as a means of centralizing authority and minimizing potential abuses.[38]

In sum, Congress enacted Title III to protect the privacy of the public in general by establishing an outright ban[39] on electronic surveillance. Congress then enacted a detailed list of requirements to be complied with before the use of electronic surveillance by law enforcement officials could be approved.[40] These requirements were designed to assure that authorization of the use of electronic surveillance would satisfy the constitutional criteria enumerated by the Supreme Court in *Katz* and *Berger*.[41]

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34. *Id.*

35. § 2510(9)(a). Additionally, a wiretap may be authorized by "a judge of any court of general criminal jurisdiction of a State." § 2510(9)(b).

36. S. REP. NO. 1097, *supra* note 11, at 91, *reprinted in* 1968 U.S.C.C.A.N. at 2179. Commenting on the definition in § 2510(9), the Senate Judiciary Committee noted:

> Paragraph (9) defines "judges of competent jurisdiction." This definition designates the judicial officers whose responsibility it will be to supervise authorized interceptions. Existing Federal search warrant practice permits U.S. Commissioners and city mayors to issue warrants (18 U.S.C. § 3021 (1964)). *This practice is too permissive for the interception of wire or oral communications. Only judges of Federal district courts or courts of appeal should issue Federal warrants. . . . This is intended to guarantee responsible judicial participation in the decision to use these techniques.*

Id. (emphasis added).

37. § 2516(1) (1988 & Supp. V 1993). See *supra* note 26 for the text of § 2516(1).

38. S. REP. NO. 1097, *supra* note 11, at 97, *reprinted in* 1968 U.S.C.C.A.N. at 2185.

39. § 2511 (prohibiting the interception and disclosure of wire, oral, or electronic communications).

40. §§ 2516-2519 (1988 & Supp. V 1993).

41. S. REP. NO. 1097, *supra* note 11, at 66, *reprinted in* 1968 U.S.C.C.A.N. at 2153.

B. *Legislative History of the Federal Magistrates Act*

1. The Original Federal Magistrates Act

Congress passed the Federal Magistrates Act[42] in 1968 "to abolish the office of U.S. commissioner and reform the first echelon of the federal judiciary into an effective component of a modern scheme of justice by establishing a system of U.S. magistrates."[43]

The commissioner system contained a number of defects that prevented commissioners from becoming an effective component of the federal court system. Compensation was based on a fee system which limited earnings to $10,500 per year.[44] This low salary level made it difficult to attract highly qualified individuals to serve as commissioners.[45] Additionally, Congress believed that the pecuniary interest created by the fee-for-service system was inconsistent with the neutral administration of justice.[46]

Congress addressed the deficiencies of the commissioner system through the creation of magistrates. In this way, Congress hoped to attract a higher quality judicial officer and expand upon the duties previously delegated to commissioners.[47] Congress vested the magistrate with all powers previously held by United States commissioners,[48] as well as the powers to hear and determine pretrial matters and conduct preliminary hearings on post trial motions.[49]

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42. 28 U.S.C. §§ 631-639 (1988 & Supp. V 1993).

43. H.R. REP. No. 1629, 90th Cong., 2d Sess. 11 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4253-54.

44. H.R. REP. No. 1629, *supra* note, 43 at 13, *reprinted in* 1968 U.S.C.C.A.N. at 4255-56.

45. *Id.* Commissioners worked on a fee-for-service basis. Therefore, their total income was determined by the number of services performed. Because total income was limited by the $10,500 ceiling, there was little incentive for efficiency or productivity. Additionally, a commissioner was not required to be a member of the bar, and in 1968, nearly one third of the commissioners were not lawyers. This, in turn, meant that commissioners often lacked the requisite education to deal with the rules of law they sought to apply. *Id.*

46. *Id.*

47. H.R. REP. No. 1629, *supra* note 43 at 14, *reprinted in* 1968 U.S.C.C.A.N. at 4257.

48. 28 U.S.C. § 636(a)(1) (1988).

49. Pub. L. No. 90-578, 82 Stat. 1107 (codified as amended at 28 U.S.C. § 636 (1988)). These powers arose from the "additional duties" clause. A magistrate could be assigned:

> [S]uch additional duties as are not inconsistent with the Constitution and laws of the United States. The additional duties authorized by the rule may include, *but are not restricted to-*
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> (1) service as a special master in an appropriate civil action . . . ;

Other sections of the Federal Magistrates Act were designed to eliminate specific deficiencies in the commissioner system. Under the Act, magistrates are required to be a member of the bar and their competence must be acceptable to the district judge making their appointment.[50] Compensation of magistrates was set to approximate that of district court judges,[51] and, unlike commissioners, magistrates were reimbursed for their expenses.[52] Together, these factors eliminated the questionable practice of commissioners working on a fee-for-service basis and helped attract better qualified personnel through an enhanced compensation system.

Congress intended the district courts to make extensive use of these new judicial officers.[53] The language of the original Magistrates Act granted a district court judge broad discretion to assign tasks under the "additional duties" clause.[54] Magistrates were given the authority to serve as special masters in civil actions, make recommendations to the district court judge regarding post-trial motions, and to assist the judge in pretrial proceedings.[55]

2. The 1976 Amendments to the Federal Magistrates Act

District court judges were not as innovative in the use of mag-

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(2) assistance to a district court judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and

(3) preliminary review of applications for post[-]trial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district court judge . . . .

Id. (emphasis added).

50. § 631 (1988 & Supp. V 1993). The House Judiciary Committee noted that local district court judges were in the best position to assess individual qualifications of a magistrate. H.R. REP. NO. 1629, *supra* note 43, at 15, *reprinted in* 1968 U.S.C.C.A.N. at 4258.

51. § 634.

52. § 635.

53. H.R. REP. NO. 1609, 94th Cong. 2d Sess. 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6166.

For a discussion of how district courts have employed the services of magistrates, *see generally* Carroll Seron, *The Professional Project of Parajudges: The Case of U.S. Magistrates*, 22 LAW & SOC. REV. 557 (1988); CARROLL SERON, THE ROLE OF MAGISTRATES IN FEDERAL DISTRICT COURTS, (Federal Judicial Center 1983).

54. Pub. L. No. 90-578, 82 Stat. 1107 (codified as amended at 28 U.S.C. § 636 (1988). See *supra* note 49 for text of the original "additional duties" clause. In addition to the language of the original Act which clearly stated that the duties are not restricted to those explicitly listed in the legislation, the Judiciary Committee report also noted that the categories listed were intended to be illustrative rather than exclusive of the duties that could be assigned. H.R. REP. NO. 1629, *supra* note 43, at 19, *reprinted in* 1968 U.S.C.C.A.N. at 4262.

55. Pub. L. No. 90-578, 82 Stat. 1113 (codified as amended at 28 U.S.C. § 636 (1988)).

istrates as Congress had hoped. Instead, courts took a restrictive view of how magistrates could be employed.[56] As a result, Congress amended the Act in 1976 to clarify and define what was intended by the "additional duties" clause.[57]

Section 636(b) was completely rewritten. This section, known as the "pretrial matters clause,"[58] permitted a judge to "designate a magistrate to determine any pretrial matter,"[59] except for eight dispositive motions.[60] The House Judiciary Committee Report on the amendment emphasized that, with the exception of these dispositive motions, a magistrate had "the power to make a determination of *any* pretrial matter."[61] Significantly, Title III authority was not one of the powers specifically withheld by the "pretrial matters" clause. Moreover, although magistrates were prevented from making a final determination of the enumerated dispositive motions, they were permitted to make recommendations on these motions

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56. *See* Wingo v. Wedding, 418 U.S. 461 (1974) (magistrate may not hold a habeas corpus hearing); Ingram v. Richardson 471 F.2d 1268 (6th Cir. 1972) (magistrate may not review Secretary's denial of social security benefits and make recommendation to a district court judge).

57. S. REP. NO. 625, H.R. REP. NO. 1609, 94th Cong. 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162. *See also* Brendan Linehan Shannon, *The Federal Magistrates Act: A New Article III Analysis for a New Breed of Judicial Officer*, 33 WM. & MARY L. REV. 253, 258-59 (1991); Marla Eisland, Note, *The Federal Magistrates Act: Are Defendants' Rights Violated When Magistrates Preside Over Jury Selection in Felony Cases?*, 56 FORDHAM L. REV. 783, 786-87 (1988).

58. 28 U.S.C. § 636(b) (1988) provides:

> (1) Notwithstanding any provision of law to the contrary—
> (A) a judge may designate a magistrate to hear and determine *any* pretrial matter pending before the court, *except* a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.
> (B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for post[-]trial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

Id. (emphasis added).

59. *Id.*

60. *Id. See also* H.R. REP. NO. 1609, *supra* note 53, at 9-10, *reprinted in* 1976 U.S.C.C.A.N. at 6170-71.

61. H.R. REP. NO. 1609, *supra* note 53, at 10, *reprinted in* 1976 U.S.C.C.A.N. at 6170 (emphasis added).

that could be adopted at the discretion of the district court judge.[62]

Further indication that Congress intended the Act to be broadly interpreted may be found in the introductory language of section 636(b)(1), which begins "[n]otwithstanding any provision of law to the contrary."[63] The House Judiciary Committee Report stated the reason for the inclusion of this clause as follows:

> The initial sentence of the revised section uses the phrase "notwithstanding any provision of law to the contrary—." This language is intended to overcome any problem which may be caused by the fact that scattered throughout the code are statutes which refer to "the judge" or "the court." It is not feasible for the Congress to change each of those terms to read "the judge or a magistrate." It is therefore intended that the permissible assignment of additional duties to a magistrate shall be governed by the revised section 636(b), "notwithstanding any provision of law" referring to "judge" or "court."[64]

Congress also amended the Magistrates Act by creating a new "additional duties" clause, section 636(b)(3), that provides "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States."[65] The original Federal Magistrates Act contained similar language.[66] When the Act was amended, Congress placed this language in a separate subsection to emphasize that the additional duties were not to be limited by other sections of the Act.[67] This subsection was intended to encourage judges "to continue innovative experimentations in the use of [magistrates]."[68] Congress believed such experimentation would result in the assignment of a wide range of additional functions to magistrates,[69] thereby improving the efficiency of the federal courts by allowing judges to devote increased time to their adjudicatory duties.[70]

The Federal Magistrates Act, its legislative history, and subsequent amendments show that Congress intended to grant magis-

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62. § 636(b)(1)(B).
63. § 636(b)(1).
64. H.R. REP. No. 1609, *supra* note 53, at 9, *reprinted in* 1976 U.S.C.C.A.N. at 6169.
65. § 636(b)(3).
66. See *supra* note 49 for the text of the original "additional duties" clause.
67. H.R. REP. No. 1609, *supra* note 53, at 10, *reprinted in* 1976 U.S.C.C.A.N. at 6172.
68. *Id.*
69. *Id.*
70. *Id.*

trates authority to determine a wide range of issues. This authority is only limited by the "Constitution and laws of the United States"[71] and the discretion of district court judges.[72] This grant of discretion was intended to encourage judges to explore innovative methods of using the magistrate's position to improve judicial efficiency.[73]

C. *Judicial Construction of the Federal Magistrates Act Following the 1976 Amendments*

While the specific issue of a magistrate's authority with respect to Title III was not addressed prior to *In re United States*,[74] the United States Supreme Court, in several cases, has considered the limits of a magistrate's authority. These cases identify the issues that must be resolved in analyzing a magistrate's Title III authority.

1. United States v. Raddatz[75]

In *United States v. Raddatz*,[76] the Supreme Court considered whether a magistrate could conduct an evidentiary hearing on a motion to suppress without *de novo* review by a district court judge. The Court first considered the Federal Magistrates Act which provided that a magistrate could not make a binding determination on certain dispositive motions, including a motion "to suppress evidence in a criminal case."[77] However, the Court noted that the Act allows a judge to "designate a magistrate to conduct hearings, including evidentiary hearings" and then make recommendations to

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71. § 636(b)(3).

72. H.R. REP. NO. 1609, *supra* note 53, at 10, *reprinted in* 1976 U.S.C.C.A.N. at 6172.

73. *Id.* Despite legislative history and amendments encouraging innovation, concerns over constitutional limits on magistrates' authority have continued to discourage innovation in some courts. The Federal Courts Study Committee recommended that this problem could be alleviated through a study of the possible constitutional limitations on magistrates. Additionally, the Committee recommended that judges be provided with a specific list of tasks which fall within the pretrial matters and additional duties clauses. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, April 2, 1990, at 80.

74. 10 F.3d 931 (2d Cir. 1993), *cert. denied*, 115 S. Ct. 64 (1994).

75. 447 U.S. 667 (1980).

76. *Id.* In *Raddatz*, the defendant moved to suppress incriminating statements he had made to law enforcement officers. The district court referred the motion to a magistrate over the defendant's objections. After a review of the findings, the district court judge adopted the magistrate's recommendation, again over the defendant's objection. The defendant's conviction was reversed by the United States Court of Appeals for the Seventh Circuit, which held that the district court judge was required to be present at the suppression hearing. *Id.*

77. 28 U.S.C. § 636(b)(1)(A) (1988).

the judge.[78] The Act also provides that within ten days, a party may object to the magistrate's recommendation, at which time the judge shall make a *de novo* determination of the findings to which the objection was made.[79]

The Court examined the interaction of these sections of the Act, as well as its legislative history, to determine whether Congress intended to require a *de novo* hearing, an actual rehearing of the testimony, or a *de novo* determination, allowing the judge to merely review the magistrate's findings. The Court found Congress' intent to be "unmistakable." The Court stated:

> Congress focused on the potential for Art. III constraints in permitting a magistrate to make decisions on dispositive motions. The legislative history discloses that Congress purposefully used the word *determination* rather than *hearing*, believing that Art. III was satisfied if the ultimate adjudicatory determination was reserved to the district court judge. . . . Congress intended to permit whatever reliance a district judge, . . . chose to place on a magistrate's proposed findings and recommendations.[80]

Since Congress intended to rely upon the district court's judgment regarding the weight to be assigned to a magistrate's report, the Court found that requiring a *de novo* hearing would frustrate the purpose of the Act.[81]

After resolving that the evidentiary hearing was properly conducted under the Act, the Court addressed the question of whether the defendant's right to due process required the presence of an Article III judge at the suppression hearing. This issue hinged on "whether the nature of . . . the interests implicated in a motion to suppress evidence require that the district court judge must actually hear the challenged testimony."[82] Despite the fact that a motion to suppress often determines the outcome of a case, the Court found that the interests involved in a suppression hearing were less significant than those involved in a criminal trial.[83] Additionally, even when the task of conducting the evidentiary hearing is delegated to a magistrate, the district court judge is in control of the process and

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78. *Raddatz*, 447 U.S. at 673 (quoting § 636(b)(1)(B)).

79. § 636(b)(1).

80. *Raddatz*, 447 U.S. at 676 (citations omitted).

81. *Id.* at 676 n.3.

82. *Id.* at 677.

83. *Id.* at 678-79. The Court noted that the evidentiary standards in such a hearing were different than those at trial and that even if a defendant was unsuccessful on his motion to suppress, the evidence could still be challenged at trial. *Id.*

makes the final binding decision. The Court determined that the defendant's due process rights were adequately protected because the ultimate control vested in the district court judge and a suppression hearing involved interests of a lesser magnitude than those involved in a trial.[84]

2. Gomez v. United States[85]

In *Gomez v. United States*,[86] the Supreme Court considered whether the "additional duties" clause[87] permitted a magistrate to conduct *voir dire* in a felony trial without the defendant's consent.[88] As in *Raddatz*, the Court first looked to the language of the Act and found neither specific authorization nor a specific prohibition concerning *voir dire*.[89] The Court noted that the limiting factors under the "additional duties" clause are the Constitution and the laws of the United States[90] and that the Court would interpret the Act in a manner that avoided raising constitutional issues.[91] The Court reasoned that the duties specifically authorized by the Act should serve as the framework for determining what additional duties would be permissible.[92]

In reviewing the legislative history of the Magistrates Act, the Court noted that Congress intended district court judges to make extensive use of magistrates.[93] Additionally, a primary goal of the

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84. *Id.* at 679-81.

85. 490 U.S. 858 (1989).

86. *Id.* In *Gomez*, the defendant objected when the district court judge assigned a magistrate to conduct *voir dire*. The judge denied the objection but offered *de novo* review of any challenges. No challenges were made. The United States Court of Appeals for the Second Circuit affirmed the petitioner's conviction, finding the delegation of *voir dire* within the "additional duties" clause of the Federal Magistrates Act. The Supreme Court reversed, holding *voir dire* was part of the trial, which meant the defendant had a right to have an Article III judge conduct *voir dire*.

87. 28 U.S.C. § 636(b)(3) (1988) provides that "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and the laws of the United States." *Id.*

88. *Gomez*, 490 U.S. at 860.

89. *Id.* at 863.

90. *Id.*

91. *Id.* at 864. "It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Id.*

92. *Id.* "When a statute creates an office to which it assigns specific duties, those duties outline the attributes of the office. Any additional duties performed pursuant to a general authorization in the statute reasonably should bear some relation to the specified duties." *Id.*

93. *Id.* at 869 (citing H.R. REP. NO. 1609, *supra* note 53, at 5, *reprinted in* 1976 U.S.C.C.A.N. at 6172).

Act was to permit district court judges to devote increased time to their adjudicatory functions by delegating non-adjudicatory tasks to magistrates.[94] Consistent with this purpose, essentially adjudicatory tasks would be more properly performed by a district court judge.[95]

In 1979, Congress amended the Magistrates Act to expand a magistrate's authority in criminal proceedings with the express limitation that the parties must consent to the magistrate's participation.[96] The Court reviewed the provisions of the Magistrates Act and, in view of its subsequent amendments, concluded that the Act carefully defined a magistrate's authority in criminal proceedings. The Court then reasoned that the limited grant of authority to preside at trials involving civil matters and misdemeanors was indicative of Congress intent to withhold authority to preside at felony trials.[97] Therefore, the authority to conduct *voir dire* could not be implied from the general language of the Magistrates Act.[98]

The lack of specific statutory authorization to conduct *voir dire* compelled the Court to consider the constitutional concerns implicated in delegating the task to a magistrate. The defendant had a constitutional right to the presence of a district court judge at all stages of the trial. Finding that *voir dire* more closely resembles a trial rather than a pretrial proceeding, the Court concluded that the defendant had a constitutional right to require the presence of a district court judge.[99] As a result, the *Gomez* Court held that a magistrate could not be assigned to conduct *voir dire* without the defendant's consent.[100]

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94. *Id.* at 872 & n.23.

95. *Id.* at 873.

96. 18 U.S.C. § 3401(a) (1988) provides that a district judge may designate a magistrate to try persons charged with misdemeanors. Even when a judge makes such a designation, a magistrate can only exercise this jurisdiction with the written consent of the defendant. § 3401(a)(b).

97. *Gomez*, 490 U.S. at 872.

98. *Id.* The Court expressed its concern that *voir dire* was the type of procedure which did not lend itself easily to *de novo* review because firsthand observation of the jurors' demeanor is critical in determining their suitability. This type of observation is best accomplished when jurors are first questioned and introduced to the case. Since direct observation is of such great value in evaluating potential jurors, the defendant's right to the presence of an Article III judge is not adequately protected by a judge's reexamination of jurors. *Id.* at 874-75.

99. *Id.* at 872-73 (citing Lewis v. United States, 146 U.S. 370, 374 (1892)).

100. *Id.* at 876.

3. Peretz v. United States[101]

Two years later, the Supreme Court again addressed the issue of whether a magistrate could conduct *voir dire*. The critical distinction between *Gomez* and *Peretz* was that, in *Peretz*, the magistrate impaneled the jury with the defendant's consent and no objection was raised until after conviction.[102] Writing for the majority, Justice Stevens noted that the *Gomez* decision was limited to situations in which the parties did not consent to the magistrate's participation in *voir dire*.[103] Because the defendant in *Gomez* had not consented, the assignment of the magistrate to conduct *voir dire* raised the issue of whether the defendant had a constitutional right to demand the presence of an Article III judge at each stage of the trial.[104] Because of the constitutional question raised by the defendant's objection, the *Gomez* Court had required a clear expression of congressional intent regarding a magistrate's authority to conduct *voir dire*.[105]

Since the defendant in *Peretz* consented to a magistrate being assigned to conduct *voir dire*, the Court attached "far less importance . . . to the fact that Congress did not focus on jury selection as a possible additional duty."[106] Instead, the Court placed substantial weight upon Congress' intention to improve the efficiency of the judicial system and held that delegation of *voir dire*, with the consent of the parties in a criminal trial, was consistent with congressional intent.[107]

The Court, in *Raddatz*, *Gomez*, and *Peretz*, applied traditional rules of statutory construction to determine whether a particular task may be assigned under the Federal Magistrates Act. The initial step was to look for specific authorization within the Magistrates Act. Since both the "pretrial matters" and "additional duties" clauses provide general grants of authority, language authorizing a specific task often does not exist. Where the language of the Act contained no specific authorization or exclusion, the Court deter-

101. 501 U.S. 923 (1991).
102. *Id.* at 925-26.
103. *Id.* at 927-28.
104. *Id.* at 929-30.
105. *Id.*
106. *Id.* at 932.
107. *Id.* The opinion makes frequent reference to the importance of magistrates. "[W]e recognize that Congress intended magistrates to play an integral and important role in the federal judicial system." *Id.* at 928. "[T]he role of the magistrate in today's federal judicial system is nothing less than indispensable." *Id.* (quoting Government of the Virgin Islands v. Williams, 892 F.2d 305, 308 (3d Cir. 1989)).

mined whether the task was consistent with Congress' intent in enacting the Magistrates Act.

As the *Gomez* Court noted, the duties specified in the Magistrates Act provided the framework for determining what Congress intended as permissible duties.[108] The Court reasoned that if no constitutional issues were implicated, a task consistent with congressional intent was within the scope of the Act. Finally, the Court has applied a more stringent analysis in cases which raised constitutional issues.[109] In such cases, where neither the Act nor congressional intent was obvious, the Court has interpreted the Act narrowly, choosing the alternative which avoids the implication of constitutional questions.

II. *IN RE UNITED STATES*[110]

A. *District Court Proceedings*

In February, 1992, Judge Korman, serving in the Miscellaneous Part of the United States District Court for the Eastern District of New York, announced his intention to refer all applications for electronic eavesdropping orders to a United States Magistrate Judge for approval.[111] Judge Korman found this delegation of authority to be authorized under both the "pretrial matters"[112] and "additional duties"[113] clauses of the Federal Magistrates Act.[114] Judge Korman also found wiretap applications analogous to applications for search warrants and arrest warrants, which magistrates may approve.[115] According to Judge Korman, Congress' stated objective of allowing a district court judge to devote more time to adjudicatory duties would be furthered by delegating wiretap authority to magistrates.[116]

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108. Gomez v. United States, 490 U.S. 858, 864 (1989).

109. *Id. See supra* note 91.

110. 10 F.3d 931 (2d Cir. 1993), *cert. denied*, 115 S. Ct. 64 (1994).

111. *In re* United States Attorney, 784 F. Supp. 1019, 1020 (E.D.N.Y. 1992), *rev'd*, 10 F.3d 931 (2d Cir. 1993), *cert. denied*, 115 S. Ct. 64 (1994).

112. 28 U.S.C. § 636(b)(1) (1988).

113. § 636(b)(3). "A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." *Id.*

114. *In re United States Attorney*, 784 F. Supp. at 1021.

115. *Id.* at 1025.

116. *Id.* at 1027. 18 U.S.C. § 2518 (1988) imposes follow-up duties on the judge issuing a wiretap order. The judge may require periodic reports while the wiretap is in effect. All recordings must be delivered to the judge who is responsible for sealing and maintaining custody of the recordings. *Id.* Additionally, the judge must file a detailed report with the Administrative Office of the United States Courts within thirty days of the expiration of an order. § 2519.

On June 30, 1993, Judge Korman made his first referral. The United States Attorney then petitioned for a mandamus review of the district court's order due to the government's concern that evidence obtained under an electronic surveillance order issued by a magistrate would be ruled inadmissible. The government argued that authorization of a wiretap by a magistrate would violate the authorization provisions of Title III.[117]

B. *The Majority Opinion*

The United States Court of Appeals for the Second Circuit granted mandamus review and held that there must be explicit statutory language authorizing magistrates to approve applications for electronic eavesdropping.[118]

The majority's analysis focused on the language of Title III, the Federal Magistrates Act, and the Electronic Communications and Privacy Act of 1986 (the "Privacy Act")[119] as well as Congress' intent in passing those acts. Since the Magistrates Act postdated Title III, considerable attention was given to whether the language of Title III could be read fairly to include federal magistrates within its authorization provisions. Additionally, the court considered whether the language of the Magistrates Act could be construed to permit approval of wiretap applications.[120]

The Second Circuit, in its Title III analysis, employed a strict reading of the language used by Congress. The court found that congressional concern over the intrusive nature of wiretaps and the extensive detail governing the wiretap application process indicated that Congress intended the use of wiretaps to be strictly controlled.[121] As a result of Congress' privacy concerns, the court reasoned that magistrates must have explicit congressional authorization to approve these applications.[122]

The majority's inquiry regarding congressional intent hinged on whether the authorization provisions of Title III[123] could be read

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117. *In re* United States, 10 F.3d 931 (2d Cir. 1993), *cert. denied*, 115 S. Ct. 64 (1994).

118. *Id.* at 938.

119. 18 U.S.C. §§ 3121-3127 (1988).

120. *In re United States*, 10 F.3d at 934-35.

121. *Id.* at 938.

122. *Id.*

123. 18 U.S.C. § 2516(1) (Supp. V 1993) requires that an electronic surveillance application must be approved by "a federal judge of competent jurisdiction." *Id.* See *supra* note 26 for full text of § 2516(1).

18 U.S.C. § 2510(9) (1988) defines a "judge of competent jurisdiction" as:

to include magistrates. The court noted that the phrase "federal judge of competent jurisdiction" was defined as "a judge of the United States district court or a United States court of appeals."[124] However, the court was unwilling to read this language expansively to include magistrates.[125]

The Second Circuit found strong support for this proposition in *United States v. Giordano*.[126] In *Giordano*, the Supreme Court had held that the Attorney General could not delegate the authority to authorize a wiretap application to the Attorney General's Executive Assistant.[127] The Supreme Court found that such a delegation was limited by Title III, even though the Attorney General had general statutory authorization[128] to delegate duties within the Justice Department.[129] Although the language of Title III did not ex-

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(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions or wire, oral, or electronic communications.

Id.

124. § 2510(9)(a).

125. *In re United States*, 10 F.3d at 938.

126. 416 U.S. 505 (1974). In *Giordano*, the Court considered whether to admit evidence obtained under a wiretap application authorized by the Attorney General's Executive Assistant. The application, which was approved by a district court judge, was submitted by an Assistant United States Attorney. The application inaccurately described the Assistant Attorney General as the authorizing official when it had actually been authorized by the Attorney General's Executive Assistant.

The authorization provisions of Title III have been amended since *Giordano* was decided in 1970. The authorization provision in effect in 1970 provided that applications must be authorized by "the Attorney General, or any Assistant Attorney General specially designated by the Attorney General." Pub. L. No. 90-351, 82 Stat. 216 (codified as amended at 18 U.S.C. § 2516(1) (1968)). This provision was subsequently amended to enlarge the number of officials within the Department of Justice that were authorized to approve wiretap applications. The authorization provision now in effect provides:

> The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General or any Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications . . . .

§ 2516(1) (Supp. V 1993).

127. *Giordano*, 416 U.S. at 514.

128. 28 U.S.C. § 510 (1988) provides: "The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of *any function of the Attorney General*." *Id.* (emphasis added).

129. *Giordano*, 416 U.S. at 514.

pressly prohibit the Attorney General from delegating authority, the Supreme Court held that Congress' intent was to allow wiretap applications to be initiated only by those persons who were "responsive to the political process."[130]

The Second Circuit found a strong parallel between the Attorney General's responsibility to authorize wiretap applications and a district court's responsibility to review them. The authorization provisions[131] and definitions[132] contained in Title III contain no reference to magistrates. The majority reasoned that, since *Giordano* limited Title III authority to authorize wiretap applications to only those specifically named, approval of the *use* of wiretaps should be similarly limited. Since magistrates are not specifically mentioned in Title III's provisions, the court reasoned they could not exercise Title III authority.[133]

It is important to note that as Title III predated the Federal Magistrates Act, it was impossible for Congress to have included magistrates in Title III's provisions. The court considered this argument and found it unpersuasive since Congress could have written specific authorization into the Magistrates Act or amended Title III to grant approval power.[134] The court noted that Congress also could have addressed the issue in the Privacy Act[135] but failed to do so.

The Second Circuit rejected the district court's conclusion that a magistrate could assume the authority to approve wiretaps under

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130. *Id.* at 520.

131. 18 U.S.C. § 2516(1) (1988 & Supp. V 1993). See *supra* note 26 for the relevant statutory text.

132. §§ 2510(9)(a), 2516. See *supra* note 123 for the full statutory text of § 2510(9).

133. *In re* United States, 10 F.3d 931, 938 (2d Cir. 1993), *cert. denied*, 115 S. Ct. 64 (1994).

134. *Id.*

135. 18 U.S.C. §§ 3121-3127 (1988), the Privacy Act, makes no mention of magistrates with regard to wiretaps. The Act does provide that an application for the use of a pen register or trap and trace device may be made to a court of competent jurisdiction. § 3122(a)(1). A pen register records the numbers dialed from a telephone, while a trap and trace device records the numbers of incoming calls. § 3127(3).

The Privacy Act defines a court of competent jurisdiction as "a district court of the United States (*including a magistrate of such court*) or a United States Court of Appeals." § 3127(2)(A) (emphasis added).

The Second Circuit found that had Congress intended magistrates to fall within the definition of a "Federal judge of competent jurisdiction," it easily could have amended Title III at the time the Privacy Act was passed. The Act did make several changes in the definitions contained in Title III but left § 2510(9) unchanged. *In re United States*, 10 F.3d at 936.

the Act's "pretrial matters"[136] and "additional duties"[137] clauses. The enumerated powers granted to a magistrate contain no reference to Title III but rather give magistrates, *inter alia*, the right to assist the district court in pretrial matters.[138] Although the "pretrial matters" clause includes the power to issue search warrants or arrest warrants, the court found these warrants were not analogous to wiretap applications. The court reasoned that electronic surveillance is much more intrusive than a physical search and therefore held that the authority to issue a search warrant did not imply the authority to approve a wiretap.[139] The Court of Appeals for the Second Circuit recognized that amendments to the Magistrates Act were intended to prevent the Act from being construed narrowly.[140] However, the court held that, given Congress' overriding concern for protecting individual privacy, expansion of a magistrate's authority to include the area of electronic surveillance could not be justified.[141]

C. *Judge Cardamone's Dissent*

In his dissent, Judge Cardamone focused on the language of the Magistrates Act rather than on Title III. He reviewed the legislative history of the Magistrates Act and found that Congress intended a magistrate's powers to be interpreted as broadly as possible. Judge Cardamone noted that Congress had amended the Act in 1976 because courts had construed the Act too narrowly, inhibiting the judicial experimentation Congress sought to encourage when the Act was passed.[142]

The 1976 amendment that rewrote the "pretrial matters" clause specifically provided eight exceptions[143] to matters that fall

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136. 28 U.S.C. § 636(b)(1) (1988).

137. § 636(b)(3). See *supra* note 113 for the full statutory text.

138. § 636(b)(1).

139. *In re United States*, 10 F.3d at 938. The court noted that Congress had specifically withheld wiretap authority from United States commissioners who were replaced by the passage of the Federal Magistrates Act. *Id.* Congress felt that commissioners could not be entrusted with the responsibility to approve wiretaps, given the permissiveness with which they issued search warrants. S. REP. NO. 1097, *supra* note 11, at 91, *reprinted in* 1968 U.S.C.C.A.N. at 2179. *See supra* note 36 for the pertinent language. *See also* H.R. REP. NO. 1629, *supra* note 43, at 13, *reprinted in* 1968 U.S.C.C.A.N. at 4256.

140. *In re United States*, 10 F.3d at 938.

141. *Id.*

142. *Id.* at 939 (Cardamone, J., dissenting).

143. 28 U.S.C. § 636(b)(1)(A) (1988) provides:

A judge may designate a magistrate to hear and determine any pretrial matter

within a magistrate's authority. Judge Cardamone reasoned that these eight exclusions, coupled with the fact that Title III referrals are not mentioned, indicated that Congress did not intend to deny magistrates the authority to approve wiretap applications. Instead, the dissent found wiretap applications to be similar to search and arrest warrants which may be approved by magistrates under the authority granted by the "pretrial matters" clause. Judge Cardamone determined that search warrants, arrest warrants, and wiretap applications require magistrates to make similar probable cause determinations.[144] Based on the similar probable cause determination required by all three types of warrants, Judge Cardamone reasoned that the authority to approve wiretaps was consistent with the matters that may be delegated under the "pretrial duties" clause.[145]

Judge Cardamone noted that when Congress passed the Magistrates Act, the Senate and House Judiciary Committees recognized that it would be impractical for Congress to change every reference to a judge or court to include magistrates.[146] For this very reason, Congress inserted the language "notwithstanding any provision of law to the contrary" into the Act.[147] Since the specific purpose of this language was to eliminate the need for adding the term "magistrate" throughout the Code, the absence of the word magistrate in Title III was not, by itself, indicative of a congressional intent to withhold wiretap authority from magistrates.

Judge Cardamone also reasoned that the "additional duties" clause was also a possible source of Title III authority. Congress provided this clause to allow district court judges the freedom to

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> . . . *except* a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.

Id. (emphasis added).

144. *In re United States*, 10 F.3d at 941 (Cardamone, J., dissenting). Although Judge Cardamone cites no case law supporting this analogy, it is consistent with the Supreme Court's holding in Katz v. United States, 389 U.S. 347 (1967). In *Katz* the Court held that a warrant was required since the invasion of privacy resulting from a wiretap implicated the same rights as those involved in a physical search. *Id.* at 353. See *supra* notes 28-32 and accompanying text.

145. *In re United States*, 10 F.3d at 941 (Cardamone, J., dissenting).

146. *See supra* note 64 and accompanying text.

147. *In re United States*, 10 F.3d at 940. *See also supra* note 64 and accompanying text.

make innovative use of magistrates.[148] Indeed, such experimentation has generally been permitted so long as constitutional issues are not involved.[149] Judge Cardamone found no constitutional concern was implicated here, since the probable cause determination required by the Fourth Amendment[150] is essentially the same in both wiretap applications and affidavits supporting search warrants.[151]

III. ANALYSIS

In *In re United States*, the United States Court of Appeals for the Second Circuit held that a magistrate could not be delegated the task of authorizing an application for electronic surveillance because such a delegation of authority was inconsistent with the goals Congress sought to achieve in enacting Title III.[152] Additionally, the Second Circuit held that the language of the Federal Magistrates Act did not permit delegation of wiretap approval to a magistrate.[153]

However, a different result may be reached when the language of the Act is analyzed within the parameters developed by the Supreme Court in *United States v. Raddatz*,[154] *Gomez v. United States*,[155] and *Peretz v. United States*.[156] In those cases the Court focused on the specific language of the Act, Congress' intent in en-

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148. H.R. REP. NO. 1609, *supra* note 53, at 12, *reprinted in* 1976 U.S.C.C.A.N. at 6172.

149. *See supra* part I.C, discussing Peretz v. United States, 501 U.S. 923 (1991) (holding that a magistrate may conduct *voir dire* with defendant's consent) and Gomez v. United States, 490 U.S. 858 (1989) (holding that a magistrate cannot conduct *voir dire* without defendant's consent).

150. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

151. *In re United States*, 10 F.3d at 943.

152. *Id.* at 938.

153. *Id.*

154. 447 U.S. 667 (1980). See *supra* part I.C.1 for a discussion of the Court's opinion in *Raddatz*.

155. 490 U.S. 858 (1989). See *supra* part I.C.2 for a discussion of the Court's opinion in *Gomez*.

156. 501 U.S. 923 (1991). See *supra* part I.C.3 for a discussion of the Court's opinion in *Peretz*.

acting the Magistrates Act, and the significance of the constitutional issues raised by the delegation of a particular task to a magistrate.

A. *The Statutory Language*

The Second Circuit's first step in analyzing the government's appeal of the district court's order was to examine the relevant statutory language.[157] The Court found it significant that neither Title III, the Magistrates Act, nor the Privacy Act[158] contain language specifically authorizing a magistrate to approve Title III applications.[159]

Although the language of the Magistrates Act does not include the authority to approve wiretap applications as one of a magistrate's enumerated powers, the list of enumerated powers is not exclusive.[160] Additionally, the approval of Title III applications is not one of the items specifically excluded from a magistrate's power to "hear and determine."[161] The "pretrial matters" clause gives a judge the power to delegate "any pretrial matter" to a magistrate[162] and Congress considered search and arrest warrants to be pretrial matters within the definition of the Magistrates Act.[163] If wiretap warrants are a specific type of search warrant, it may be argued that they fall within the category of pretrial matters.

Additionally, in *Gomez v. United States*,[164] the Supreme Court held that a magistrate's additional duties must be based on their relationship to their specific duties.[165] Magistrates have the authority to issue search warrants and to approve the use of "pen registers" and "trap and trace devices."[166] In both instances, magistrates are making probable cause determinations involving privacy rights and in the latter case a form of electronic surveillance is being employed. Under the *Gomez* test, the additional duty—approving

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157. *In re United States*, 10 F.3d at 934.

158. 18 U.S.C. §§ 3121-3127 (1988).

159. *In re United States*, 10 F.3d at 935-38.

160. *See* H.R. REP. No. 1629, *supra* note 43, at 19, *reprinted in* 1968 U.S.C.C.A.N. at 4262.

161. 28 U.S.C. § 636(b)(1)(A) (1988).

162. *Id.*

163. *See* H.R. REP. No. 1609, *supra* note 53, at 6-7, *reprinted in* 1976 U.S.C.C.A.N. at 6166-67.

164. 490 U.S. 858 (1989).

165. *Id.* at 864.

166. See *infra* part III.B discussing the similarities among wiretap warrants, search warrants, pen registers and trap and trace devices.

wiretap applications—bears a strong relation to the specific duties already granted to magistrates.

The Second Circuit also found it significant that Title III itself makes no specific mention of a magistrate's authority. Of course, the definition in Title III could not have included magistrates since that judicial officer did not exist at the time Title III was enacted. A Title III application must be authorized by "a Federal judge of competent jurisdiction,"[167] which is defined as either a federal district or appellate court judge.[168] Because magistrates are not included within Title III's definition of a court of competent jurisdiction, the Second Circuit reasoned that Title III authority could not be delegated to a magistrate.[169] The Court relied on *United States v. Giordano*,[170] for the proposition that the language of Title III is to be strictly construed.[171]

Because a magistrate had never been delegated wiretap authority, the courts have not had occasion to decide how narrowly the definition of a judge of competent jurisdiction should be construed. Although the language of Title III makes no reference to magistrates, Title III cannot be read in isolation. The language of section 636(b)[172] of the Magistrates Act was intended as a modification of language throughout the United States Code.[173] If, as section 636(b) requires, the term "judge" in Title III is read to include the term "magistrate," then Title III would implicitly grant magistrates wiretap authority.

B. *Congressional Intent*

Since the statutory language is not dispositive, the next step in the analysis is to determine whether the legislative history of the statutes indicates that Congress intended Title III authority to fall within the scope of a magistrate's duties. The Second Circuit's holding that Congress had no such intent was based on its interpretation of the legislative history of Title III and Congress' subsequent failure to either amend Title III or include Title III authority

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167. 18 U.S.C. § 2516(1) (Supp. V 1993).

168. § 2510(9)(a). See *supra* note 123 and accompanying text.

169. *In re* United States, 10 F.3d 931, 935-36 (2d Cir. 1993), *cert. denied*, 115 S. Ct. 64 (1994).

170. 416 U.S. 505 (1974).

171. *In re United States*, 10 F.3d at 937.

172. 28 U.S.C. § 636(b) (1988).

173. H.R. REP. No. 1609, *supra* note 53, at 9, *reprinted in* 1976 U.S.C.C.A.N. at 6169. *See supra* note 64 and accompanying text.

in the Magistrates Act.[174]

The phrase "a Federal judge of competent jurisdiction" was a focal point of the court's analysis. The Second Circuit relied heavily on the report of the Senate Judiciary Committee as an indication of whether this phrase could be read to include magistrates.[175] In enacting Title III, Congress made it clear that it intended to withhold Title III authority from United States commissioners due to dissatisfaction with the perfunctory manner in which they approved search and arrest warrants.[176] The court reasoned that a judicial officer's power to approve Title III applications could not be inferred from the fact that the judicial officer could issue search warrants.[177]

The Second Circuit's conclusion is not as inevitable as it appears. Congress did not simply withhold Title III authority from commissioners, it abolished the office and replaced it with magistrates. The fact that magistrates were given duties that had been improperly executed by their predecessors, coupled with the more substantive duties granted to magistrates by Congress, provides clear evidence that Congress did not liken one office to the other. The commissioners' powers merely formed the basis for determining the initial powers Congress granted to magistrates.[178] Therefore, while it is clear that Congress intended to withhold wiretap authority from commissioners, it is not equally clear that the same restraint was intended to be placed on magistrates. The Second Circuit's conclusion that magistrates and commissioners should be subject to the same restraints is undermined by the fact that Congress and the courts consistently have expressed high regard for the performance of magistrates since the office was established.[179]

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174. *In re United States*, 10 F.3d at 938.

175. *Id.* The report is necessarily silent on the subject of magistrates because they did not exist at the time. The definition pointedly excluded United States commissioners however. Congress noted that commissioners were poorly suited to protect privacy interests in the area of electronic surveillance, given their permissive practices in granting search warrants. *See* S. REP. No. 1097, *supra* note 11, at 91, *reprinted in* 1968 U.S.C.C.A.N. at 2179. See *supra* note 36.

When the same Congress later passed the Federal Magistrates Act, it once again noted that commissioners were too permissive in granting search warrants and arrest warrants. H.R. REP. No. 1629, *supra* note 43, at 13, *reprinted in* U.S.C.C.A.N. at 4256.

176. H.R. REP. No. 1629, *supra* note 43, at 13, *reprinted in* U.S.C.C.A.N. at 4256.

177. *In re United States*, 10 F.3d at 938.

178. 28 U.S.C. § 636(a)(1) (1988) provides that a magistrate shall have "all powers and duties conferred or imposed upon United States commissioners." *Id.*

179. *See* H.R. REP. No. 1609, *supra* note 53, at 4, 6 *reprinted in* 1976 U.S.C.C.A.N. at 6164, 6166.

The Second Circuit's reliance on *United States v. Giordano*[180] as a basis for finding Congress intended to deny magistrates Title III authority is also questionable. The legislative history of Title III cited in *Giordano* clearly indicates that Congress, as well as the Department of Justice, intended to limit which officials within the Department of Justice could initiate wiretap applications.[181] This limitation was created to ensure that any abuse of the process could be traced to a clearly identifiable and politically responsible individual who initiated the wiretap application.[182] The limitation on who could approve a wiretap was motivated by a different concern: that wiretaps were approved by a responsible judicial officer. That concern may be satisfied by a magistrate acting under authority delegated by a district court judge.

Although Congress specified matters that a magistrate could not hear and determine, it still granted a district court judge broad discretion to allow a magistrate to hear and make recommendations on those very matters.[183] Moreover, Congress required judicial authorization of a wiretap in order to conform to the criteria enunciated by the Supreme Court in *Katz v. United States*.[184] The Court required that the "impartial judgment of a judicial officer . . . be interposed between the citizen and the police."[185] If Congress' purpose was to provide an additional layer of judicial authority as protection for individuals' rights, this purpose may be satisfied through the use of a magistrate.

Additionally, both the language and the legislative history of the 1976 amendments to the Magistrates Act make it clear that Congress intended the terms "judge" and "magistrate" to be used interchangeably throughout the United States Code.[186] Indeed, the only limitations on the magistrate's authority are those imposed by inconsistency between the Magistrates Act and the Constitution or

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"It can hardly be denied that the system created by the Federal Magistrates Act has exceeded the highest expectations of the legislators who conceived it." Peretz v. United States, 501 U.S. 923, 928 n.5 (1991) (quoting Government of the Virgin Islands v. Williams, 892 F.2d 305, 308 (1989)).

180. 416 U.S. 505 (1974).

181. *Id.* at 514-23.

182. S. REP. NO. 1097, *supra* note 11, at 97, *reprinted in* 1968 U.S.C.C.A.N. at 2185.

183. 28 U.S.C. § 636(b)(1) (1988).

184. 389 U.S. 347 (1967). *See* S. REP. NO. 1097, *supra* note 11, at 66, *reprinted in* 1968, U.S.C.C.A.N. at 2153.

185. *Katz*, 389 U.S. at 357 (citing Wong Sun v. United States, 371 U.S. 471, 481-82 (1962)).

186. See *supra* note 64 and accompanying text.

the laws of the United States.[187]

Although the court in *In re United States* conceded that Congress intended the Magistrates Act to be interpreted broadly, it held that Title III is one area in which the Act is intended to be interpreted narrowly.[188] The court found it significant that Title III had not been amended to include magistrates within the definition of "courts of competent jurisdiction."[189]

The court also found it significant that Congress failed to grant magistrates Title III authority at the time the Privacy Act granted them the authority to approve the use of pen registers and trap and trace devices.[190] Here the court misinterpreted the intent of this section of the Privacy Act. Rather than being a specific extension of magistrates' authority, the Privacy Act was passed as a limitation on the freedom of law enforcement officials to monitor telephone activity. Pen registers and trap and trace devices were consciously omitted from the restrictions of Title III[191] and, prior to passage of the Privacy Act, the use of these devices was not restricted.[192] Passage of the Privacy Act made the use of pen registers and trap and trace devices subject to the warrant requirement contained in Title III. Thus, the Privacy Act provides protection of privacy rights by requiring the use of these devices be permitted only after proper judicial approval has been obtained. Since the Privacy Act specifically grants magistrates this authority, it is obvious that Congress believed magistrates were competent to protect privacy rights.

It is clear from the legislative history of the Federal Magistrates Act and its subsequent amendments that Congress has displayed high regard for these judicial officers.[193] Congress clearly expressed its intent that district courts should use magistrates in an expansive and innovative manner when it amended the Act in

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187. 28 U.S.C. § 636(b)(3) (1988).

188. *In re* United States, 10 F.3d 931, 936 (2d Cir. 1993), *cert. denied*, 115 S. Ct. 64 (1994).

189. *Id.* at 936.

190. *In re United States*, 10 F.3d at 935-37. The Privacy Act specifically authorizes magistrates to authorize the use of these devices. See *supra* note 135 for the statutory language granting magistrates the authority to approve applications for the use of pen registers and trap and trace devices. 18 U.S.C. § 3127(2)(A).

191. S. REP. No. 1097, *supra* note 11, at 90, *reprinted in* 1968 U.S.C.C.A.N. at 2178. "The proposed legislation is not designed to prevent the tracing of phone calls. The use of a 'pen register,' for example, would be permissible." *Id.*

192. 18 U.S.C. § 2511(h)(1988) provides "[i]t shall not be unlawful under this chapter (i) to use a pen register or trap and trace device." *Id.*

193. *See* H.R. REP. No. 1609, *supra* note 53, at 4-8, *reprinted in* 1976 U.S.C.C.A.N. at 6164-68.

1976.[194] That is exactly what Judge Korman attempted to do in delegating approval of a Title III application to a magistrate. Thus, a decision upholding Judge Korman's action would have been more consistent with Congress' intent in enacting the Magistrates Act.

C. *Delegation of Title III Authority to a Magistrate Does Not Violate the Fourth Amendment*

When the language of a statute does not provide a clear grant of authority, the policy of the Supreme Court has been to seek an alternative which avoids raising potential constitutional questions.[195] Although the Second Circuit did not express concern over the constitutionality of a wiretap authorized by a magistrate, its reasoning was based, in part, on the fact that a wiretap does implicate Fourth Amendment privacy rights.[196] The Second Circuit reasoned that congressional concern for privacy rights was one factor that led to the enactment of Title III. As a result of this concern, the court held that the language of the Magistrates Act must be strictly construed in determining whether the delegation of Title III authority was permissible.[197]

However, neither the language of Title III,[198] nor its legislative history, indicate that Congress believed there was a constitutional requirement that an Article III judge authorize a wiretap.[199] The original requirement that a wiretap could not be used unless a warrant had been obtained arose from the Supreme Court's holding in *Katz v. United States* that electronic surveillance was an invasion of privacy that implicated Fourth Amendment rights.[200] Title III's authorization provision is designed to satisfy the *Katz* criteria "that the deliberate, impartial judgment of a judicial officer . . . be inter-

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194. *See* H.R. REP. NO. 1609, *supra* note 53, at 10, *reprinted in* 1976 U.S.C.C.A.N. at 6172.

195. Gomez v. United States, 490 U.S. 858, 864 (1989). "It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Id.*

196. *In re United States*, 10 F.3d at 938.

197. *Id.*

198. 18 U.S.C. § 2510(9)(b) (1988) grants wiretap authority to "a judge of any court of general criminal jurisdiction of a State." *Id.*

199. *See* S. REP. NO. 1097, *supra* note 11, at 97, *reprinted in* 1968 U.S.C.C.A.N. at 2179. Congress granted wiretap authority to state and federal court judges to ensure warrant approval would be handled responsibly, not because it believed authorization by an Article III judge was required by the Fourth Amendment. *See supra* note 36.

200. Katz v. United States, 389 U.S. 347, 353-56 (1967).

posed between the citizen and the police."[201] The *Katz* Court required only the judgment of a judicial officer, rather than an Article III judge, to satisfy the warrant criteria. As such, there is little doubt that a magistrate would satisfy the constitutional wiretap warrant requirement enunciated in *Katz*.

The mere existence of a constitutional question does not force the conclusion that magistrates are precluded from approving surveillance applications. Search warrants, as well as warrants for pen registers and trap and trace devices, which may be issued by a magistrate,[202] raise similar constitutional questions. The *Katz* Court based its warrant requirement on the similarity between electronic surveillance and physical searches of an individual's person or property.[203] Because the rights protected by these types of warrants are similar, it is consistent that they should both be approved by the same judicial officer. Similarly, because a magistrate is permitted to authorize search warrants, pen registers and trap and trace devices, it follows that a magistrate should be permitted to issue wiretap warrants.

However, these warrants are distinct in two significant areas. First, a search warrant provides notice to the suspect, while a wiretap warrant does not. Additionally, the lack of notice is inherent in the nature of a wiretap; in *Katz*, the Court acknowledged that notice is not possible in wiretap situations, since notice would make it impossible to obtain the evidence that was the target of the tap.[204] The *Katz* Court held that a wiretap approved by a proper judicial officer could serve the "legitimate needs of law enforcement" while protecting the individual's right to privacy.[205] The Supreme Court found the imposition of a layer of judicial authority between the police and the suspect essential to the preservation of the Fourth Amendment rights of an individual who was the target of a wiretap.[206] Notice cannot be given to the target of a wiretap regardless of the judicial authority authorizing the tap. Similarly, no notice is given when pen registers or trap and trace devices are employed, yet both may be authorized by magistrates.[207]

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201. *Id.* at 357 (quoting Wong Sun v. United States, 371 U.S. 471, 481-82 (1962)). *See supra* notes 24 & 27 and accompanying text.

202. *Id.* See *supra* note 135 for the statutory language authorizing a magistrate to approve the use of pen registers and trap and trace devices.

203. *Id.* at 353.

204. *Id.* at 355 n.16.

205. *Id.* at 354-56.

206. *Id.* at 357.

207. 18 U.S.C. § 3127(2)(A) (1988).

Second, while a search warrant permits a one-time search, the wiretap warrant provides for a more intrusive continual monitoring of the suspect. The greater degree of intrusiveness was one of the reasons the Second Circuit found that search warrants were not analogous to Title III applications.[208] However, this high level of intrusiveness exists regardless of who approves a Title III application. Pen registers and trap and trace devices also involve continual monitoring of telephone activity, yet Congress specifically granted magistrates the authority to approve their use.[209]

Because of the intrusiveness of wiretaps, commentators have argued for a stricter probable cause standard for wiretaps approved by any judicial officer.[210] Such a standard is better addressed by specifying the evidentiary requirements that constitute probable cause than by merely addressing who approves the warrant. Title III already requires greater detail in a wiretap application than is required for a search warrant.[211] Any government agent engaged in investigating criminal activity may seek a search warrant.[212] Wiretap applications, however, may only be authorized by the "Attorney General, Deputy Attorney General, Associate Attorney General, or any acting Assistant Attorney General, or Deputy Assistant Attorney General in the Criminal Division specifically designated by the Attorney General."[213] Additionally, a wiretap may only be sought for the investigation of specified crimes,[214] while a search warrant may be sought to obtain evidence of any criminal activity.[215] The application for a wiretap permit must also state that all other means of investigation have failed and provide a complete statement describing any previous wiretap applications regarding the subject of the surveillance.[216] In contrast, a search warrant merely requires that there be probable cause.[217]

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208. *In re* United States, 10 F.3d 931, 938 (2d Cir. 1993), *cert. denied*, 115 S. Ct. (1994).

209. *Id.*

210. Elan Gerstmann, *Letting Katz Out of the Bag: Re-Evaluating Probable Cause in the Context of Electronic Eavesdropping*, 22 LOY. U. CHI. L.J. 193 (1990) (arguing for the requirement that law enforcement officials show a higher degree of probable cause in obtaining wiretap approval).

211. *Compare* 18 U.S.C. §§ 2515-2518 (1988 & Supp. V 1993) *with* FED. R. CRIM. P. 41.

212. FED. R. CRIM. P. 41(h).

213. § 2516(1) (Supp. V 1993).

214. § 2516(1)(a)-(n) (1988 & Supp. V 1993).

215. FED. R. CRIM. P. 41(b).

216. 18 U.S.C. § 2518(c), (e) (1988).

217. FED. R. CRIM. P. 41(c).

By providing strict requirements under Title III, Congress has established a more stringent probable cause standard for wiretaps. However, whether more stringent standards are required is not the issue in this case. The intrusion into the privacy of a suspect is the critical issue involved in the issuance of search or wiretap warrants. As noted by the *Katz* Court, it is the need to protect personal privacy that necessitates a warrant in either case.[218] A search warrant issued by a magistrate satisfies the strictures of the Fourth Amendment for searches that intrude on personal privacy. Similarly, a wiretap application approved by the same judicial officer should satisfy the *Katz* criteria that a judicial officer be interposed between the police and a suspect who is the subject of a wiretap.[219]

CONCLUSION

In *In re United States*,[220] the Second Circuit employed a restrictive interpretation of both the Federal Magistrates Act and Title III. This interpretation is inconsistent with the congressional intent underlying the passage and subsequent amendments to the Federal Magistrates Act. The Magistrates Act was passed to improve the efficiency of the judicial system by granting district court judges broad discretion to delegate a wide range of tasks to magistrates. Congress reacted to the failure of courts to experiment with innovative uses of magistrates by amending the Act in 1976 to create the "pretrial matter" and "additional duties" clauses.

The district court judge's decision to delegate Title III authority to a magistrate was consistent with the type of experimentation Congress sought to encourage in an effort to improve judicial efficiency. As Judge Korman noted, Title III imposes ongoing duties on the judicial officer who approves a Title III application. Therefore, delegation of Title III authority would shift those duties to a magistrate, freeing the district court judge to devote additional time to adjudicatory duties that cannot be delegated.

The delegation of Title III authority is also consistent with the criteria developed by the Supreme Court in analyzing additional duties that may be delegated to a magistrate. This is particularly true in light of the Court's decision to use a magistrate's enumerated powers as the basis for determining whether delegation of another duty is consistent with congressional intent. The probable

218. Katz v. United States, 389 U.S. 347, 353-55 (1967).
219. *Id.* at 357.
220. 10 F.3d 931 (2d Cir. 1993), *cert. denied*, 115 S. Ct. 64 (1994).

cause determination required by the approval of a Title III application is sufficiently analogous to the probable cause determinations already made by magistrates in approving search and arrest warrants. Additionally, magistrates are specifically authorized to approve the use of other forms of electronic surveillance, namely pen registers and trap and trace devices. The fact that Congress granted this authority demonstrates congressional confidence in magistrates' ability to safeguard Fourth Amendment rights in authorizing the use of this type of electronic surveillance.

Delegation of Title III authority is also consistent with Title III's goal of satisfying the *Katz* requirement that a responsible judicial officer be interposed between law enforcement officials and individuals who are the subject of electronic surveillance.[221] Congress demonstrated its confidence in magistrates' competence by enlarging their duties through the 1976 amendments to the Magistrates Act and by specifically including magistrates within the Privacy Act's definition of a court of competent jurisdiction.

Although a strong argument can be made that Title III authority may be delegated to a magistrate under the existing language of Title III and the Magistrates Act, the Second Circuit's decision makes it unlikely that such a delegation will be made in the future. Law enforcement officials cannot proceed under a Title III application authorized by a magistrate without the fear that the evidence obtained would later be ruled inadmissible. Therefore, Congress should address this issue by amending Title III to expressly grant district court judges the option of delegating Title III authority to a magistrate. Such an amendment would preserve the involvement of district court judges in Title III applications while providing a judge with the option to delegate Title III authority to a competent magistrate. An amendment of this type would preserve the privacy safeguards created by Title III while enhancing the judicial efficiency that is the fundamental goal of the Federal Magistrates Act.

Thomas R. Garcia

221. *Katz*, 389 U.S. at 357.